98-304

No.

Supreme Court, U.S.
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In The

**SUPREME COURT OF THE UNITED STATES**

October Term, 1998

Garland Robertson,

Petitioner

vs.

United States of America,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

# PETITION FOR A WRIT OF CERTIORARI

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93 pp

## QUESTIONS PRESENTED

Whether, pursuant to limitations imposed on the actions and decisions of a federal agency by the Administrative Procedure Act (APA), 5 U.S.C. § 701, et seq:

1. Is the combined authority of church and state as fused in the requirement that an Air Force chaplain be a "representative of a religious body and a commissioned officer" (AFR 265-1, ¶3) so repugnant to military necessity that it is caused to be constitutionally dysfunctional?

2. Did Air Force officers fail to comply with statutory and regulatory procedures by removing an endorsed Air Force chaplain from the pulpit as discipline for alleged "unauthorized political activity" rather than proceeding according to provisions directed by the Uniform Code of Military Justice (UCMJ)?

3. Did Air Force officers violate constitutional command and congressional mandate for management of Air Force chaplains as specified in Air Force Regulation (AFR) 265-1, The Chaplain Service, by acting as superior theological judges, thereby discounting the moral assessment prerogative of an Air Force chaplain's endorsing faith community?

4. Did Air Force officers abuse their discretionary authority by censoring the religious programs sponsored by a base chapel, selecting which religious perspectives would be published on the military installation, using religion to

promote secular interests that did not coincide with religious interests, and exercising inordinate influence over the religious lives of military subordinates?

5. Did the Air Force Board for Correction of Military Records (AFBCMR) err by not taking into consideration the fact that the Appellant's performance was rated "Unsatisfactory" only after the Appellant was removed from the pulpit for alleged "unauthorized political activity"--the singular factor which prompted the Secretary of the Air Force (SAF) to order the chaplain's release from active duty?

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Petitioner Garland Robertson respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

## ORDERS AND JUDGMENT BELOW

The Orders and Judgment of the United States Court of Appeals for the Tenth Circuit is on docket of Case No. 97-5183 (App. A). The Order of the District Court is on docket of Case No. 96-C-888-B (App. B); and a related proceeding is on District Court docket of Case No. 95-C-1135-B. The decision of AFBCMR is at App. C.

## STATEMENT OF JURISDICTION

The Judgment of the United States Court of Appeals for the Tenth Circuit ("Court of Appeals") was entered on May 1, 1998. The Court of Appeals denied a timely petition for rehearing on May 27, 1998 (App. A).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to

petition the Government for a redress of grievances.

5 U.S.C. § 702 states in pertinent part:

> [a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein denied on the ground that it is against the United States...

5 U.S.C. § 706 states in relevant part:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -
>
> * * * *
>
> (2) hold unlawful and set aside agency action, finding, and conclusions found to be -
> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudical error.

AFR 265-1, The Chaplain Service, ¶ 3., directs:
Air Force Chaplain. A chaplain is a representative of a religious body and a commissioned officer according to 10 U.S.C. 8067. Chaplains observe the requirements of the first amendment of the Constitution.

**STATEMENT OF THE CASE**

The constitutional endorsement of the military chaplaincy endures, in theory, to extend the Free Exercise right to soldiers whose military assignments require them to be absent from their chosen communities of faith. In practice, the United States Air Force uses the military chaplaincy as a national religious confederacy, manipulated by Air Force officers to promote secular interests that do not coincide with religious interests.

**A. Historical background.**

On January 8, 1991, an Air Force chaplain was charged with "unauthorized political activity" and removed from the base chapel's preaching rotation after the following letter to the editor was published in a local newspaper.

> The impression which Vice President Quayle has communicated to the American soldiers in Saudi Arabia cannot go unchallenged. His comment, "The American people are behind you," must be clarified to indicate that the American people are not united in their decision to support a military offensive against the aggression of Saddam Hussein in Kuwait.
>
> While the human rights violations committed by the Iraqis against the people of Kuwait are atrocious, unfortunately these violations are not exceptions to human rights abuses elsewhere in the world. Our presence in the Persian Gulf region has to do with economic issues primarily.
>
> I have written 25 members of the Armed Services committees in Washington, and their responses reveal a substantial number of Americans, including governmental officials of distinction, oppose the U.S.-led forceful expulsion of the Iraqis from Kuwait. Other options are available which many believe are more sensitive to the best interest of the world community.
>
> If President Bush remains adamant about using force to drive Iraq from Kuwait, the American soldiers will respond with the full measure of their

> capabilities--they are servants committed to defend the national interests of the people to whom they have entrusted their lives. The need to use military force in this circumstance, however, is an open issue--one which the citizens of this country will not allow to be decided in the vacuum of sectarian perception.
>
> GARLAND L. ROBERTSON
> Chaplain
> Dyess Air Force Base

The intense congressional debate which criticized the use of U.S. military power in a presidentially-initiated offensive against Iraq followed shortly after this letter was published.

Inspite of recently praising the chaplain in a November, 1990, "Definitely Promote" career progression, over the next 30 months the Air Force reduced the chaplain from a highly commended officer to an unsatisfactory leader, an incompetent preacher, insubordinate and mentally-ill, then ordered the chaplain to leave active duty. Throughout this lengthy controversy the endorsing denomination continuously supported the chaplain's religious ministry.

Petitioner still believes the unprecedented action of local Air Force officers to restrict chapel preaching compromises the integrity of the military chaplaincy, insults the calling of a religious minister, discounts the credibility of the chaplain's faith community, and disregards the spiritual sensitivities of military servants that determine their choice of a religion.

Persons who perform the function of military chaplains in the Air Force must

be commissioned officers. 10 U.S.C. § 8067(h). They have rank without command, but otherwise are to be afforded the same considerations for all other officers. 10 U.S.C. § 8581. Chaplains are subject to disciplinary proceedings according to provisions of the UCMJ. 10 U.S.C. § 802. As such, alleged "unauthorized political activity" would merit issuing a declaration of violation of Article 91 of the UCMJ, then, if disputed by the alleged offender, the matter could be resolved at court-martial. This proscribed procedure, however, was rejected by local supervisors.

Tension inherent in requiring chaplains to be representatives of a religious body and commissioned officers prompted local Air Force officials to censor religious programs presented by a local base chapel. Censorship caused the federally-funded military chaplaincy to promote secular interests that did not coincide with religious interests. Air Force officers assumed the role of theological critics and selected the religious perspectives which would be published on the military installation.

The record will disclose that a vast majority of American Christian churches had, by January 1991, publicly announced that a war initiated by the U.S. against Iraq at that time could not be morally justified according to the tenets of the ancient "Just War" theory. In censoring the religious witness of its chaplains, the Air Force exercised inordinate influence over the religious lives of subordinate military servants by creating a religious climate "friendly" to political intent. Thus the Air Force ultimately controlled the context in which its members made moral judgments.

Soldiers of the Christian faith who enter the voluntary armed forces come primarily from religious communities that participate in the ancient "Just War" tradition. In varying degrees, these congregations recognize the obligation to move beyond the original tenet of "doing no harm." They have discerned that "protecting innocent persons from harm" (dating from the fifth-century Christian community) may sometimes require the use of violence. These persons of faith measure such circumstances according to the sacred writings and accumulated guidance of their traditions. Soldiers, therefore, bring with them these previously-embraced provisons for moral assessment.

In theory, chaplains preserve this Free Exercise right for soldiers, making "religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is not available to them." Katcoff v. Marsh, 755 F.2d 223, 234 (2d Cir. 1985) Sometimes this "right" requires soldiers to struggle to reconcile the moral assessment of their chosen faith community whenever it contradicts political intent. What appears to be functional in theory, however, may become intolerable in practice. When Air Force officials censor chaplains, they evoke questions of loyalty and integrity, and they force chaplains to choose either for the military or for the religious body.

At issue in this case is whether the Air Force violated a chaplain's mandate to be both a representative of a religious body and a commissioned officer; whether fulfilling this dual responsibility is possible.

**B. Background of District Court Case No. 95-C-1135-B.**

After the Air Force Legal Service denied a prior complaint against the Air Force, Plaintiff filed a claim against the United States under the Federal Tort Claims Act (FTCA) and APA 5 U.S.C. § 701 et seq., in the District Court for the Northern District of Oklahoma on November 14, 1995. The Court's Order, filed March 25, 1996, dismissed Plaintiff's FTCA claim for lack of subject matter jurisdiction, with prejudice, and dismissed under APA for failure to state a claim, with prejudice.

**C. The Proceedings Below Case No. 96-C-888-B.**

After AFBCMR denied the Plaintiff's requests to delete substandard performance reports from the military record and to rescind SAF's order directing removal from active duty, published August 23, 1996, Plaintiff filed another claim against the United States under APA in the same District Court on September 27, 1996. The Court concluded that Plaintiff's prior claim under APA "should have been without prejudice to refiling when a final agency decision was reached" (Order, App. B, p. 35-36, n.4).

The Court recognized "this institutional duality of the military chaplaincy directly implicates the Establishment Clause principles of 'nonentanglement' and 'neutrality'", citing Marsh v. Chambers, 463 U.S. 783, 801-03. (Order, App. B, p. 57) The Court further observed:

> that the test for nonentanglement for programs, such as the military chaplaincy, which require an administrative relationship between government and religious entities, is that the programs must preserve "the autonomy and freedom of religious bodies while avoiding any semblance of established religion" Walz v. Tax Commission, 397 U.S. at 672. (Order, App. B, p. 57)

Similarily, the Court informed that "the principle of '[g]overnmental neutrality in matters of religion' prevents government from advancing or inhibiting religion." Id. at 694. (Order, App. B, p. 57-58) The Court concluded, "Without these safeguards, the institutional duality of the military chaplaincy engenders the risk of politicizing religion." Id. at 695. (Order, App. B, p. 58)

The Court discussed the serious questions of "excessive entanglement" and lack of "neutrality" which are raised in the military administration of the chaplain programs (Order, App. B, p 58-59), and remarked:

> The excessiveness of such entanglement is no more apparent than is a situation such as the one Robertson presents where the Air Force requires a chaplain's early retirement (or discharges a chaplain) based on military criteria, although the chaplain's endorsing agency has not withdrawn its endorsement of the chaplain as its representative. This unilateral decision on the part of the Air Force hardly preserves "the autonomy and freedom" of the endorsing agency. Walz, 397 U.S. at 672.

Despite these precedential observations, the Court "found no underlying constitutional violation of Robertson's rights under the First Amendment, and thus AFR 265-1, and . . . the Court affirm[ed] the decision of the AFBCMR." (Order, App. B. p. 69)

The Court's assessment and judgment of the Petitioner's grievance acknowledges the deference traditionally applied to military disputes (Order, App. B. p. 42-44). The Court's application of deference to military discretion in this case, however, is excessive privilege because of the existence of AFR 265-1, The Chaplain Service. This regulation is a descriptive statute by order of SAF and signed by the Air Force Chief of Staff. As such, AFR 265-1 is the official, predisposed policy designed by the Air Force itself for managing Air Force chaplains, including directing a chaplain to be "a representative of a religious body and a commissioned officer" and to "observe the requirements of the first amendment." AFR 265-1, Section B, ¶3.

Line of duty regulations promote the benefit of the employer, and deviation from regulations proscribing activities of service personnel in "line of duty" is sufficient to impute liability to the government under FTCA. Piper v. United States, 887 F.2d 861, 863-64 (8th Cir. 1989). [Although not on point, this discussion confirms that the judiciary believes it is reasonable to expect the military to comply with its own rules.] The presumptuous, censorial behavior of Air Force officials in removing endorsed chaplains from the pulpit for "unauthorized political activity" readily

qualifies as "arbitrary, capricious, an abuse of discretion" and action "in excess of statutory jurisdiction, authority." APA 5 U.S.C. § 706(2)(A)&(C).

## REASONS FOR GRANTING THE WRIT

### I.

### THE WRIT SHOULD BE GRANTED BECAUSE THE JUDGMENT OF THE COURT BELOW CONTRADICTS THE JUDGMENT OF THE COURT OF APPEALS, 2ND CIRCUIT

Katcoff v. Marsh, 755 F.2d 223 (2d Cir. 1985) upheld the constitutionality of the military chaplaincy, citing preserving Free Exercise as the critical factor (at 223, 234). Free Exercise protects the prerogative of the faith community to make independent moral assessment. Judgment by the Court below inhibits Free Exercise by distinguishing "moral assessment" as "political activity" and permitting Air Force officers to remove endorsed chaplains from the pulpit for unchallengeable alleged "unauthorized political activity."

AFR 265-1 clearly intends to prevent the Air Force from simultaneously maintaining a chaplain service and controlling the religious perspective published by a base chapel. Such a license would rape the protective boundary of church-state independence guarenteed by the Constitution and affirmed by Katcoff which deference to military discretion cannot excuse. Such a license would unequivocally and indefensibly create a religious

environment designed by Air Force officers which inhibits chaplains from representing the moral assessment that originates in their faith communities. Such a license obviously would work to respect the establishment of a specific religious orientation--one particularly nationalistic, officially advanced, and federally funded.

## II.

## THE WRIT SHOULD BE GRANTED BECAUSE THE COURT BELOW ABANDONED PROVISIONS OF APA TO CONDONE ILLEGAL ACTIONS OF AIR FORCE OFFICERS

Administrative Procedure Act, 5 U.S.C §706, instructs the reviewing court to

> (2) hold unlawful and set aside action, findings, and conclusions found to be (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law. . . .

Clarification provided in the "Notes" that follow indicates a statute of a federal agency held to be an accurate representation of congressional mandate is an appropriate guide for the court to review agency action and decision (Note 12). Also, assuming the statutory procedures meet constitutional requirements, the court is limited to determination of whether the agency substantially complied with its statutory

and regulatory procedures, and whether action was within the scope of the agency's authority (Note 24). Futhermore, it is arbitrary and capricious for an agency not to take into account all relevant factors in making its determinations. An agency's failure to consider important aspects of a problem which the original regulation was intended to address renders the regulation arbitrary and capricious (Note 109).

By its own admission, the Air Force indicates that, when determining the Air Force had acted appropriately in managing the Appellant, AFBCMR did not take into consideration the implications of removing an endorsed chaplain from the pulpit for alleged unauthorized political activity:

> Plaintiff claims the decision of the AFBCMR failed to take into consideration the impact of removing chaplains from the preaching staff on religion in the military. It was not necessary for the AFBCMR to evaluate this argument. Defendant's Reply to Plaintiff's Response to Defendant's Motion to Dismiss and Cross Motion for Summary Judgment, p. 3, Case 9-C-888-B

As a result, the Air Force's alleged violation of constitutional command and congressional mandate reflected in AFR 265-1 was exonerated.

## III.

## THE WRIT SHOULD BE GRANTED BECAUSE THE UNITED STATES SUPREME COURT HAS NOT JUDGED THE CHARACTER AND NATURE OF THE MILITARY CHAPLAINCY

Two Courts of Appeals have recently delivered conflicting judgments concerning the character and nature of the military chaplaincy. These contradictions confirm that historical concerns associated with the maintenance of a uniformed, federally-funded chaplaincy have not been resolved.

The Katcoff court considered apparent conflicts with the military chaplaincy and the religion clauses of the First Amendment and concluded constitutional measure is maintained whenever Free Exercise prevails (at 228, 234). Free Exercise will justify the chaplaincy in spite of Establishment Clause concerns only insofar as the chaplains actually promote free exercise.

The court below comfortably allows the Air Force to view any "moral objection" as "political activity":

> The court further recognized that although plaintiff sincerely believed that the war he opposed would be morally unjust, this sincerity did not require accommodation by the Air Force, which viewed any moral objection as political under its rules. (Appeals Order, App. A, p. 9-10)

By designating moral assessment as political activity, both the Air Force and the court below concede the military chaplaincy endures in essence to function as a political agency. Yet, an essential element of Free Exercise is affirming the prerogative of the faith community to make independent moral assessment.

The character and nature of the military chaplaincy remains unclear.

## CONCLUSION

Regulation of religious representation is an important consideration under the Constitution on any level, yet no where more serious than in so close an association between government and religion as the evolved structure and function of the military chaplaincy presents. Allowing military officers to declare as "political activity" the endorsed religious witness of a military chaplain and, as discipline for "unauthorized" offenses, to remove the chaplain from the preaching rotation is a perplexing and dangerous precedent, one the Supreme Court may not responsibly relinguish to a lower judiciary. Such a "discretionary privilege" destroys the Free Exercise guaranty Katcoff requires for constitutional blessing and leaves the military chaplaincy in a peculiarly precarious predicament.

The Supreme Court should redeem, perhaps even "define," the religious integrity of the military chaplaincy by finally judging this complaint. In addition, because of opposing judgments by the Courts of Appeals 2nd and 10th Circuits, the Supreme Court of the United States should clarify the constitutional role of the military chaplaincy.

Accordingly, Petitioner respectfully requests that the petition for writ of certiorari be granted.

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**APPENDIX A -- OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

GARLAND ROBERTSON, Plaintiff-Appellant

v.

UNITED STATES, Defendant-Appellee

No. 97-5183

ORDER

Filed May 27, 1998

Before BRORBY, BARRETT, and BRISCOE, Circuit Judges.

Appellant, Garland Robertson's petition for rehearing is denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

**ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT**

GARLAND ROBERTSON, Plaintiff-Appellant

v.

UNITED STATES, Defendant-Appellee

No. 97-5183
(D.C. No. 96-CV-888-B)
(N.D. Okla.)

ORDER AND JUDGMENT*

[* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.]

Filed May 1, 1998

Before BRORBY, BARRETT, and BRISCOE, Circuit Judges

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of this appeal. See Fed. R. App. P. 34(a); 10th Cir. R. 34.1.9. The case is therefore ordered submitted without oral argument.

Plaintiff Garland Robertson appeals from an order of the district court determining that defendant Air Force did not violate his First Amendment rights. As in the district court, plaintiff argues on appeal that his involuntary retirement from active duty as an Air Force chaplain should be set aside because his retirement was based upon

performance evaluations which served as religious censorship in violation of his First Amendment rights and also served to establish a military religion in violation of the First Amendment. [n.1 Plaintiff does not continue to argue on appeal that the Air Force did not comply with prescribed administrative procedures in his retirement process. See Appellant's Br. at 41.] Additionally, plaintiff argues that his action was not barred from adjudication under the Federal Tort Claims Act (FTCA), 28 U.S.C. §§ 2671-2680, pursuant to Feres v. United States, 340 U.S. 135, 146 (1950). We affirm.

The district court thoroughly and accurately set forth most of the facts in its order. See R., vol. 1, tab 13 at 2-16. We provide only a brief summary here. On January 5, 1991, prior to Operation Desert Storm, plaintiff wrote a letter to the local newspaper editor indicating moral and ethical objections to initiating a war against Iraq. Plaintiff signed his name and indicated that he was a chaplain at Dyess Air Force Base. His commander reprimanded him for writing the letter setting forth his military title and base assignment. The commander stated that plaintiff had violated Air Force regulations precluding such political activity. Based on the reprimand, the senior chaplain refused to allow plaintiff to preach as scheduled the following Sunday and removed him from the preaching schedule until further notice.

Thereafter, plaintiff's orders to staff a hospital to care for soldiers wounded in Operation Desert Storm were canceled. Although he was twice selected

for reassignment to another Air Force base, both bases refused him positions.

In May 1991, plaintiff was returned to the preaching rotation. Following a sermon in which he informed the congregation of the actions taken against him by Air Force officials, he received a letter of counseling. In December 1991, after a Thanksgiving service, plaintiff was permanently removed from the preaching schedule for improperly focusing his sermon on Native American spirituality, rather than on traditional Christian beliefs.

Plaintiff received substandard performance reviews rating him as not meeting standards for leadership skills from April 1991 to April 1993. Plaintiff took issue with the reviews. Pursuant to orders, he underwent three psychological examinations during that time period. The second and third examinations indicated that he suffered from a personality disorder, not otherwise specified, with narcissistic, obsessive-compulsive, and passive-aggressive traits.

In March 1993, plaintiff was requested to retire voluntarily, or face administrative action to remove him for substandard performance. On June 1, 1993, plaintiff requested voluntary retirement effective June 1, 1994. On June 15, 1993, he was notified that a discharge proceeding had been initiated against him. The Board of Inquiry found that plaintiff should be removed from active duty and given an honorable discharge. On December 1, 1994, plaintiff retired.

On December 16, 1994, he filed an application for correction of his

military records with the Air Force Board for the Correction of Military Records (AFBCMR). He requested that his poor performance ratings be removed from his personnel record. He also requested that the order of involuntary retirement be rescinded.

In November 1995, plaintiff filed an action in district court asserting claims under the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706, and the FTCA. The district court dismissed the FTCA claims for lack of subject matter jurisdiction and dismissed the APA claims for failure to state a claim, based on the doctrine of nonjusticiability. Plaintiff did not appeal.

Subsequently, the AFBCMR denied his request to delete his substandard performance reports from his records and to rescind his involuntary retirement.

Plaintiff then filed this second federal court action under the APA. He alleged the Air Force had violated his First Amendment rights and had established a military religion. The district court denied relief, and this appeal followed.

As a preliminary matter, we first consider the district court's determination of justiciability. As the district court stated, in Lindenau v. Alexander, 663 F.2d 68 (10th Cir. 1981), this court adopted the two-step justiciability test set forth in Mindes v. Seaman, 453 F.2d 197, 201-02 (5th Cir. 1971). The first step requires that "a court should not review internal military affairs in the absence of (a) an allegation of the deprivation of a constitutional right, or an allegation that the military has acted in violation

of applicable statutes or its own regulations, and (b) exhaustion of available intraservice corrective measures." Id. at 201. Recognizing that not all such allegations are reviewable, Mindes requires at the second step a weighing of the following factors: (1) "[t]he nature and strength of the plaintiff's challenge to the military determination[;]" (2) "[t]he potential injury to the plaintiff if review is refused[;]" (3) "[t]he type and degree of anticipated interference with the military function[;]" and (4) "[t]he extent to which the exercise of military expertise or discretion is involved." Id.

The district court questioned the viability of the Mindes test in light of the Supreme Court's holding in Darby v. Cisneros, 509 U.S. 137, 138, 153, 154 (1993), that plaintiffs are not required to exhaust administrative remedies before seeking review under the APA where no statute or agency rule requires exhaustion before judicial review. Exhaustion, however, is not an issue in this case, as it is undisputed that plaintiff has exhausted military remedies.

Regardless of exhaustion, the district court declined to apply any part of Mindes and proceeded to review the merits of the case. In doing so, the district court noted there was no Supreme Court precedent for excepting the military from all judicial review under the APA, the APA expressly includes claims of constitutional violations within its scope of review, Supreme Court authority permits deferential judicial review of constitutional challenges to

military actions, and such a case would not be precluded from review under traditional political question doctrine.

We conclude the district court erred in refusing to apply the Mindes test. At no time has this court overruled Lindenau or rejected application of the Mindes test. See Clark v. Widnall, 51 F.3d 917, 921 (10th Cir. 1995) (recognizing Lindenau's adoption of four-part second-step test of Mindes); Costner v. Oklahoma Army Nat'l Guard, 833 F.2d 905, 907 (10th Cir. 1987) (recognizing adoption of Mindes); Rich v. Secretary of the Army, 735 F.2d 1220, 1225 n.3 (10th Cir. 1984) (same). Accordingly, the Mindes test still applies to "insure[] that judicial intrusions into military matters are limited to the vindication of federal interests." See Watkins v. United States Army, 875 F.2d 699, 736 (9th Cir. 1989) (Hall, J., dissenting).

In this case, plaintiff alleged a vilation of his First Amendment rights and exhausted any administrative remedies. [n.2 We need not reach the question of the viability of the exhaustion component of the first step of the Mindes test in light of Darby because there is no issue of failure to exhaust in this case. We do note, as did the district court, that other courts have no longer required exhaustion in military cases due to the holding in Darby. See, e.g., Dowds v. Clinton, 18 F.3d 953, 1994 WL 85040, at **1 (D.C. Cir. 1994) (table); St. Clair v. Secretary of the Navy, 970 F. Supp. 645, 647-48 (C.D. Ill. 1997); Perez v. United States, 850 F. Supp. 1354, 1359-61 (N.D. Ill. 1994).] Thus, he met the first step of the Mindes test. In

weighing the four factors in the second step, we conclude as a matter of law that plaintiff's claims are of the type which are reviewable on their merits. [n.3 The Air Force does not argue that this case is not justiciable. We conclude it has waived the issue and has conceded justiciability.] See Rich, 735 F.2d at 1225 n.3, 1228-29 (concluding case was justiciable where First Amendment claim, among other claims, was raised); see also Goldman v. Weinberger, 475 U.S. 503 (1986) (reviewing First Amendment challenge to Air Force dress code regulation); Brown v. Glines, 444 U.S. 348 (1980) (reviewing First Amendment challenge to Air Force regulation regarding circulating petitions); Ogden v. United States, 758 F.2d 1168, 1179 n.7 (7th Cir. 1985) (recognizing that application of Mindes test to circumstances of Goldman clearly indicates judicial review was appropriate in that case; determining that because First Amendment rights were raised, review was proper under Mindes analysis); St. Clair v. Secretary of the Navy, 970 F. Supp. 645, 648 (C.D. Ill. 1997) (holding First Amendment claims fall within scope of judicial review). But see Khalsa v. Weinberger, 779 F.2d 1393, 1398-1400 (9th Cir.) (rejecting First Amendment challenge to Army appearance regulation under Mindes second step.) aff'd, 787 F.2d 1288 (9th Cir. 1985) (affirming prior decision and noting Goldman was decided in circuit rejecting Mindes).

On appeal, plaintiff argues the Air Force improperly put his duty as an officer ahead of his duty to the church. Plaintiff contends that his removal from

the pulpit after writing the letter to the newspaper editor was the event from which all else eminates. Although plaintiff recognizes that the Air Force may discipline him for engaging in unauthorized political activity, he maintains that removal from the pulpit enters a "religious dimension," violating his First Amendment rights. Appellant's Br. at 26-27. Furthermore, he argues that by removing him from the pulpit after he wrote the letter, the Air Force determined the content of sermons, avoided presentation of sensitive issues, determined the religious needs of the Air Force congregation were different from those of other congregations, and promoted a philosophy to enhance the national spirit prevalent at the time. Likewise, when he was removed from the preaching schedule after the Thanksgiving Service, he believes the Air Force abused its authority and improperly disciplined him for an allegedly inappropriate focus. Because he continued to be endorsed for preaching by his denomination, he believes that his ministry was not inappropriate. Accordingly, plaintiff argues that the Air Force improperly determines religious content in violation of the First Amendment.

The district court rejected these arguments. Initially, the court recognized the need for deference when considering constitutional challenge to military decisions. The court further recognized that although plaintiff sincerely believed that the war he opposed would be morally unjust, this sincerity did not require accommodation by the Air Force, which viewed any moral

objection as political under its rules. The district court found no constitutional violation pertaining to the Air Force's actions in censuring plaintiff's criticism of the Persian Gulf War in his capacity as an Air Force officer; rather, the court found that the Air Force was enforcing neutral, legitimate and significant interests which defeat challenge under the First Amendment.

Additionally, plaintiff's status as an Air Force chaplain did not alter the district court's finding. Noting that a chaplain is a member of both military and religious denomination institutions, the court recognized serious implication of the Establishment Clause principles of excessive entanglement and lack of neutrality in the military administration of chaplaincy programs. Nonetheless, the district court determined the Air Force had neutral reasons for its actions. Thus, as to plaintiff's constitutionally based request under the APA to set aside the decision denying him reinstatement and expungement of his performance reviews, the district court concluded "that the conflict between the Air Force and [plaintiff] as an Air Force chaplain does not establish a constitutional violation of the religion clauses." R., vol. I, tab 13 at 39.

We have examined the record and relevant case law. After doing so, we conclude the district court thoroughly considered and correctly rejected plaintiff's First Amendment arguments on their merits in its order filed August 28, 1997. Seeing no reversible error, accordingly, we affirm for substantially the reasons stated by the district court.

Plaintiff's argument that he is not barred from bringing suit under the FTCA is not properly before us as plaintiff did not raise any FTCA claims in the district court. See Walker v. Mather (In re Walker), 959 F.2d 894, 896 (10th Cir. 1992)(holding court of appeals generally does not consider issues not first raised in district court). Plaintiff brought the underlying action under only the APA, not the FTCA, and sought judicial review only of the refusal to remove unfavorable reviews from his records and the denial of reinstatement.

AFFIRMED. Plaintiff's request for oral argument is DENIED. The mandate shall issue forthwith.

Entered for the Court

Mary Beck Briscoe
Circuit Judge

**APPENDIX B -- OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OKLAHOMA FILED AUGUST 28, 1997**

GARLAND L. ROBERTSON, Plaintiff

v.

United States, Defendant

Case No. 96-C-888-B

ORDER

Before the Court are Plaintiff Garland Robertson's ("Robertson") Motion for Summary Judgment (Docket #2), and Defendant United States' Motion for Summary Judgment (Docket #5). On September 27, 1996, Robertson, a former chaplain and lieutenant colonel in the United States Air Force, filed a complaint under the Administrative Procedure Act ("APA"), 5 U.S.C.A. § 701 et seq. Robertson alleges that the Air Force's punitive actions against him for questioning the need to use military force in response to Saddam Hussein's military offensive against Kuwait effectively destroy the pluralistic religious witness upon which the constitutionality of the military chaplaincy depends, and thereby promote a "military" religion. Robertson seeks summary judgment that the Air Force's actions against him violate the Free Exercise and Establishment clauses of the First Amendment and Air Force Regulation ("AFR") 265-1. The United States responds and cross moves for summary

judgment asserting that Robertson's APA claim is barred by the doctrine of res judicata; this Court lacks subject matter jurisdiction over any claim for compensatory damages; and the decision of the Air Force Board for Correction of Military Records ("AFBCMR") regarding the actions taken against Robertson should be affirmed.

A. BACKGROUND

Plaintiff entered the Air Force as a pilot, serving in Vietnam from May 1969 until 1970, and continuing to serve as a pilot until 1975 when he left the Air Force to attend the seminary. In 1982, he returned to the Air Force as a commissioned officer in the service of the chaplaincy. On January 5, 1991, prior to Operation Desert Storm, Plaintiff submitted the following letter to the editor of a local newspaper in Abilene, Texas:

> The impression which Vice President Quayle has communicated to the American Soldiers in Saudi Arabia cannot go unchallenged. His comment, "The American people are behind you," must be clarified to indicate that the American people are not united in their decision to support a military offensive against the aggression of Saddam Hussein in Kuwait.
>
> While the human rights violations committed by the Iraqis against the people of Kuwait are atrocious, unfortunately these violations are not exceptions to human rights abuses elsewhere in the world. Our presence in the Persian Gulf region has to do with economic issues primarily.

> I have written 25 members of the Armed Services committees in Washington, and their responses reveal a substantial number of Americans, including government officials of distinction, oppose the U.S.-led forceful expulsion of the Iraqis from Kuwait. Other options are available which many believe are more sensitive to the best interest of the world community.
>
> If President Bush remains adament about using force to drive Iraq from Kuwait, the American soldiers will respond with the full measure of their capabilities - they are servants committed to defend the national interests of the people to whom they have entrusted their lives. The need to use military force in this circumstance, however, is an open issue - one which the citizens of this country will not allow to be decided in the vacuum of sectarian perception.

Government's Exhibit A. [n.1 All exhibits identified as "Government Exhibits" are attached to the government's motion for summary judgment in Case No. 95-C-1135-B.] Robertson signed the letter as "Garland L. Robertson, Chaplain, Dyess Air Force Base." Id.

On January 8, 1991, Colonel Michael A. Lock ("Lock"), Commander of the 96th Combat Support Group reprimanded Robertson for the letter stating in part "I have no objection to your expressing your political opinions in letters to congressmen or in a letter to the editor. However, when you add your military title and unit of assignment to a published letter you are violating AFR

110-2, which is titled "Political Activities of Members of the Air Force." Government's Exhibit B. Lock noted that commenting on Operation Desert Shield is a political activity and questioning the President's use of force flouts military authority. Id. Robertson responded to the letter of reprimand by distinguishing his letter as one written by a military pastor and borne from ethical and moral, not political, concerns. He explained that he perceived his responsibility as military chaplain to assist soldiers in clarfying and evaluating the issue of whether the Iraqi conflict was a "just war":

> The situation in the Middle East is indeed difficult, complex, and dangerous. Iraq's aggression should not be tolerated. War, however, is an ancient, uncivilized way to resolve conflict. Whether persons are violated by jagged spears of 20MM cannons, war is barbaric and unable to produce equitable solutions for differences. Yet war may be the only alternative for safeguarding human life and checking an otherwise irreducible aggressor. In the Persian Gulf region, war is not the only alternative for reducing Iraq. Therefore, this war is immoral - it is not a just war. My duty requires that I make a moral judgment. No one is bound by my conclusion. How you decide is not my responsibility, nor will it embarrass me. I will affirm your decision.

Government's Exhibit C.

In May 1991 Robertson recieved the first of a series of unfavorable Officer

Performance Reports ("OPR"), for the period April 1, 1990 until March 31, 1991, in which he was rated as "Does Not Meet Standards" in the area of "Leadership Skills," by the Installation Staff Chaplain, Lieutenant Colonel Robert S. Leeds ("Leeds"). Government's Exhibit D. As the Additional Rater in the OPR, Lock remarked that Robertson's "scheduled TDY to support Desert Storm casualties was withdrawn because of questionable capabilities," and recommended that Robertson be removed from the Air Force chaplaincy as "he is not earning his pay." Id. Robertson filed an application to the AFBCMR to declare the OPR void, which the AFBCMR denied. In reference to the letter, the AFBCMR wrote

> We do not disagree that [Robertson] has an absolute right to express his own personal views; his error, however, occurred when he indicated his base and official title and targeted a statement by the Vice President. In so doing, he removed himself from the realm of a concerned citizen and represented himself as an Air Force officer expressing a partisn viewpoint. While the applicant justifies his actions as pastoral in nature, as a military -- and the key word is "military" -- chaplain, he is, in fact, bound by the same rules of conduct as other individuals in the Armed Forces.

Government's Exhibit O.

On May 19, 1991, in a sermon to his congregation on "The Divine Wisdom Within You", Robertson referenced the actions taken against him:

> My senior commanders as well as my immediate supervisor are of the opinion that my contribution to the well-being of this community is less than expected. They believe my presence is a negative influence; they believe my function as a chaplain has been disruptive, a service which has neither been appreciated nor desired. My career will be adjusted according to their evaluations. The issue has moved beyond the boundaries of Dyess AFB. Efforts to reassign me have been complicated because senior leaders on other bases refuse to accept me as a part of their staffs. Some of you also know of consequences which are the result of personal commitment to the wisdom communicated by the divine spirit.

Government's Exhibit E. On May 20, 1991, Leeds responded to Robertson's sermon with a Letter of Counseling noting that "[u]sing the worship service to present your personal position on staff and chaplaincy matters represents poor judgment on your part and will not be tolerated in the future." Id.

In December of 1991, Chaplain Colonel James T. Elwell, who had replaced Leeds as Installation Staff Chaplain, ordered Robertson to undergo a commander directed psychological evaluation by Captain Marlin K. Moore ("Moore"), Chief Psychological Services at Dyess AFB. Moore issued his report on February 6, 1992 on his psychological evaluation of Robertson. Moore's diagnosis identified an occupation problem and concluded that Robertson's psychiatric profile was S-1

and fully qualified for world wide duty. Moore determined that Robertson's "problems appear to have begun when he arrived at Dyess" and noted specific conflicts with Leeds and Elwell, including their disapproval over Robertson's letter to the editor. In summary, Moore noted that Robertson "appears to be psychologically intact with no evidence of significant past or present pathology," but that

> [h]is superior intellect and his self-assurance create problems for him in his job because he often convinces himself that he knows of a better way to do the task at hand. When Ch. Robertson believes he is correct in his beliefs about important matters he will tend to stand his ground even if this requires him to "fall on his sword." While others might interpret this as his being stubborn, I believe his behaviors more closely resemble those of the Old Testament prophets. Unfortunately, then, like now, prophets are often not highly esteemed, especially when their views do not fit into the mainstream of an authoritarian environment such as the military.

Government's Exhibit F. In conclusion, Moore recommended that Robertson be removed from the Dyess Chapel Staff, placed in a line position and retained in the Air Force until eligible for retirement; however, "[i]f such a job is not available or if the commander believes it is in the best interest of the Air Force for Ch. Robertson to separate, I recommend he be allowed to apply for one of the exit bonus programs

rather than face separation under AFR 36-2." Id.

On February 7, 1992, Robertson filed a Charge of Institutional Discrimination with the Air Force complaining that Air Force policies and procedures deprived him of the right to the free exercise of religion in his duties as a chaplain. Plaintiff's Exhibit to 96-C-888-B Summary Judgment Motion. Robertson stated that the Air Force took the following actions as a result of the letter: (1) he was removed from the base chapel's preaching schedule for the duration of Operation Desert Storm; (2) his scheduled temporary duty "TDY" to staff a contingency hospital in support of Operation Desert Storm was canceled; (3) in March 1991, he was assigned to Castle AFB in California, but in April the base leadership refused to accept him as part of its staff; and (4) in April 1991 he was assigned to Keesler AFB in Mississippi where he was again refused a position. Plaintiff's Exhibit to 96-C-888-B Summary Judgment Motion.

In a Summary Report of Inquiry, the Air Force concluded that the "actions taken against Chaplain Robertson for his numerous breaches in conduct and substandard performance were both measured and fair,"and not the result of wrongful discrimination. Plaintiff's Exhibit to 96-C-888-B Summary Judgment Motion. In so concluding, the Air Force found that (1) Robertson's "removal from the preaching schedule appears to have been largely a management decision to avoid further indiscretions and conflict between the chaplain and parishioners"; (2) Robertson's release from TDY in January 1991 "was a direct result of the

reprimand he received for the previously addressed violation of AFR 110-2 [the letter to the editor]," and "[i]n light of the nature of Chaplain Robertson's breach of conduct, and his expressed view on the use of US military force in the Persian Gulf, it would have been inappropriate to assign him to a contingency hospital to minister to service members who were injured as result of armed conflict in the Gulf"; and (3) although Robertson was considered and rejected for several assignments, "[t]he fact that Chaplain Robertson, through his own actions, has rendered himself unacceptable to other potential Air Force units does not constitute wrongful discrimination." Id.

In April 1992, Robertson received his second unfavorable OPR for the period of April 1, 1991 through March 31, 1992 which again cited his leadership as below standard. Government's Exhibit G. While Elwell acknowledged Robertson's organization and timely accomplishment of assigned tasks, he remarked that Robertson was not a team player and his "attitude toward authority and the Air Force system has been one marked by indifference to rebellion; at times, just short of insubordination." Id.

Robertson took issue with the OPR in his responding comments which include inter alia the following: "because of statements I had made on behalf of the Christian churches in America regarding moral objections to initiating a war against Iraq in response to the Aug 90 crisis in the Middle East," and "reference in a sermon to some of the consequences I had experienced because of my effort to apply the knowledge of faith

to life," he was suspended and then removed from the preaching schedule, and ordered to undergo a psychiatric evaluation. Characterizing these responses as an effort on the part of the Air Force to promote "prevailing preferences," Robertson concludes,

> I am an ordained minister of the Christian faith tradition. As such I am compelled to represent my interpretation of the spirit and the teaching of this standard, both in what I say and in what I do, whether the opinion is popular of not. I will not compromise the knowledge of faith I have acquired in the progress of my experience and training. I will not appear to support a pattern of community structure which does not respect individual religious liberty. If this orientation does not meet AF standards for a chaplain leader, then what does? The answer to this question will say much about the role a chaplain is expected to fulfill in the military establishment. Servants of a democratic god may be an accurate description of the kind of ministers the AF promotes. Id.

The Wing Commander, Colonel Johnny Griffin, "carefully considered Ch Robertson's comments to the OPR," and acknowledged that Robertson's "job performance [showed] a degree of technical proficiency," but concurred with Elwell's assessment that Robertson's lack of teamwork and mission support has been unacceptable." Id.

On July 10, 1992, Brigadier General Jerrold P. Allen ("Allen") issued a

Letter of Reprimand to Robertson for disrespect and insubordination toward Elwell. Allen reprimanded Robertson for seeking someone to replace him for an assigned chapel duty and for calling Elwell's insistence on Robertson's compliance with the order "childish." Allen admonished Robertson that "[y]our actions are but another incident in a pattern of inappropriate and petty behavior towards Colonel Elwell, fellow officers, and this Wing. Your disrespect has been detrimental to the chapel staff's morale and this organization." Government's Exhibit H.

On July 13, 1992, Robertson responded by explaining that there had been a misunderstanding, that he did not intend to offend Elwell, and assuring that he "will be extremely careful in the future not only to avoid giving Ch Elwell the impression that I disrespect his supervisory authority over me but also to guard my actions that they might not be interpreted as being inappropriate towards fellow officers and the Wing." Id.

During that same month, Elwell ordered Robertson to undergo another directed psychiatric evaluation due to the "continuing concern with Chaplain Robertson's job performance and personality issues that have resulted in cumulatively adverse effects on the Chapel mission, morale, and section team work," and his belief that the "problems and pattrns of behavior reflected in previous reports seem to have intensified." Government Exhibit I. Robertson was interviewed and evaluated by Richard D. Zenn ("Zenn"), Chief, Psychiatric Services. In his September

2, 1992 report, Zenn noted that although "there may not have been enough evidence to make the diagnosis at Dr. Moore's initial evaluation," Zenn concluded that the "most accurate psychiatric diagnosis of Chaplain Robertson is a Personality Disorder Not Otherwise Specified with narcissistic, obsessive-compulsive traits, and passive-aggressive traits." Finding that Robertson was fully qualified for worldwide duty with no duty restrictions, Zenn concurred with Moore's original suggestion that Robertson be assigned to a line position until eligible for retirement. If Robertson's personality style then continued to be a problem, Zenn suggested that a decision would have to be made as to whether to separate Robertson under AFR 36-2. Id.

In April 1993, Elwell again evaluated Robertson's leadership skills as below standard, for the period of April 1, 1992 through March 31, 1993, noting that Robertson's "[l]ong-term continuance job and staff relationship difficulties has led to repeated written evaluations by mental health that identify an underlying personality disorder that hinders his duty performance." Government Exhibit J. In response, Robertson objected that Elwell's actions against him and those of the leaders of the Chaplain Service were intended to "isolate one who will not promote a nationalistic spirit," and in so doing, "the Chaplain Service has betrayed the confidence of the American Christian churches, and the AF has betrayed the trust of a nation who has pledged to protect the free exercise of religion for all persons -- especially those having minority opinions." Id. Brigadier General Allen acting as both

additional rater and reviewer concurred with Elwell's assessment of Robertson's leadership and concluded that Robertson's "performance makes him a liability to the chaplaincy and the base mission." Id.

On March 23, 1993, at the time of this evaluation, Elwell and Major Joseph L. Heiman (Heiman), the Staff Judge Advocate, informed Robertson that Brig. Gen. Allen was considering an AFR 36-2 separation action against Robertson, unless Robertson put in his paperwork for retirement by mid-April 1993. Plaintiff's Exhibit to 96-C-888-B Summary Judgment Motion. Heiman told Robertson that should an AFR 36-2 proceeding be initiated, Robertson could lose all retirement benefits, even if the appeal took him beyond his 20 year retirement date of Fedruary 1, 1994. Id.

At some point between this March 23rd meeting and April 22, 1993, Robertson declined to separate voluntarily. On April 2, 1993, Elwell made a written request for a third mental evaluation of Robertson in which he concluded that a "36-2 action is in order." Plaintiff's Exhibit 11 to 95-C-1135-B Summary Judgment Motion, p. 154. Moore conducted the third mental evaluation. Government Exhibit K. When Moore contacted Robertson concerning the evaluation, Robertson declined to meet with him but provided him with written rebuttals and other documents for Moore's review. Based on these documents, the two prior mental evaluations, documents of administrative actions, memos for record and the last three OPRs, Dr. Moore changed his original diagnosis and adopted Dr. Zenn's diagnosis of Personality Disorder not otherwise

specified with Narcissistic, Passive-Aggressive, and Obsessive-compulsive traits. Although now finding that Robertson's personality disorder was "so severe as to interfere with the normal and customary completion of his duties," and thus warranted discharge pursuant to AFR 36-2, Moore recommended that Robertson be placed in a position outside the Chapel until he is eligible for early retirement because of his faithful service during the bulk of his career. Id.

On May 27, 1993, Elwell removed Robertson from all chapel duties and functions at Dyess and reassigned him to the Resource Division of the USAF Chaplain Service Institute to perform independent study and projects under the supervision of Lieutenant Colonel William K. Stothart ("Stothart"). Government Exhibit L.

On June 1, 1993, Robertson requested voluntary retirement effective a year later on June 1, 1994. Administrative Record ("AR") at 46. [n.2 All citations to the Administrative Record are to the record in 96-C-888-B.] Although the record is unclear as to why, his request for voluntary retirement was not acted upon.

On June 16, 1993, Robertson acknowledged receipt of a Letter of Notification that a Board of Inquiry ("BOI") had convened to determine whether Robertson should be discharged pursuant to AFR 36-2. AR at 47. In his indorsement, Robertson stated that he had not applied for voluntary retirement since his initial request for retirement, effective June 1, 1994, was not acted upon by the commander. Id. Nor had he tendered his resignation. Id.

On August 25, 1993, Lewis G. Burnett, Director of Military Chaplaincy, Home Mission Board, Southern Baptist Convention - Robertson's endorsing agency - wrote a letter to the Air Force "Reviewing Authorities" to affirm the denomination's endorsement of Robertson. After extolling Robertson's accomplishments, military record and character, Burnett concluded with the following remarks:

> Garland had an exemplary record until he arrived at Dyess. For years installation chaplains have attempted to "fix the problem" namely Garland Robertson. It is interesting that in nine years he went from being a first lieutenant to being a lieutenant colonel. It seems to me that the "system" in all of its dealings with Garland, have attempted to force him to comply with what they believed were their standards, rather than exerting effort to understand that this talented, gifted, and committed chaplain wants to accomplish the same goals they do. However, his emphasis in upon people first and then the mission. People accomplish missions. I believe that every institution that seeks to be consistently efficient and productive must have some kind of built-in mechanism of accountability. It is my conviction that Garland Robertson was acting as a "prophet" to encourage the system toward accountability of consistency. During two on-site visits to Dyess in 1992 and 93 office calls were made by me with three different commanders regarding Garland Robertson. These

> commanders addressed the possibility of our removing Chaplain Robertson's endorsement. . . .
> It is my opinion that Garland Robertson is in good standing with his endorsing agency and though Garland pursues his ministry differently than I would, he is supported by this office in his calling as a military chaplain.

Plaintiff's Exhibit 10 to 95-C-1135-B Summary Judgment Motion.

The BOI heard testimony and received evidence during Robertson's AFR 36-2 proceeding which took place from September 16-17, 1993. AR at 1, 4-8; Plaintiff's Exhibits 11 and 12 to 985-C-1135-B Summary Judgment Motion. After hearing testimony for two days, the BOI determined that Robertson should not be retained, and recommended to the Secretary of the Air Force that he be removed from active duty and awarded an honorable discharge. Plaintiff's Exhibit 12 to 95-C-1135-B Summary Judgment Motion.

On July 6-7, 1994, Robertson sought an independent opinion of his psychological condition from Major Paul Pyles ("Pyles"), a Board Certified Psychiatrist with the Air Force. Pyles interviewed, tested and evaluated Robertson over two days and also reviewed his medical record, prior mental evaluations, information provided by Elwell and the BOI transcript. Dr. Pyles opined that although he observed in Robertson "narcisstic [sic], obsessive-compulsive and avoidant/schizoid" traits, "the duration and time course are insufficient to warrant a diagnosis of a 'personality disorder.'" AR 17-21.

On October 14, 1994, the Secretary of the Air Force ordered that Robertson be removed from active duty as soon as possible under 10 U.S.C. §1186. Plaintiff's Exhibit 13 to 95-C-1135-B Summary Judgment Motion; AR at 49. On October 17, 1994, the Air Force relieved Robertson from active duty, effective October 31, 1994, and made his retirement effective November 1, 1994. AR at 52. This order, however, was rescinded on October 31, 1994 and a new order entered relieving Robertson from active duty, effective November 30, 1994 and making his retirement effective December 1, 1994. AR at 53-55. According to the Certificate of Release or Discharge from Active Duty, Robertson was separated from the service based on his "voluntary retirement - sufficient service for retirement." AR at 55.

On December 16, 1994, Robertson filed an application for correction of military records with the AFBCMR, requesting the removal of the OPRs for reporting periods ending 31 March 1991, 31 March 1992, 31 March 1993, and 31 March 1994, and the rescission of the Secretary of the Air Force Order of October 14, 1994 that Robertson be retired. In support of his application, Robertson submitted partial testimony from the BOI proceedings, copies of his psychological evaluations and a letter from Janet Walker ("Walker"), the Choir Director at Dyess Protestant Chapel from July 1991 until July 1992. AR 57.

In her leter, Walker praised Robertson's contribution to the Dyess Protestant chapel, noting that he was "a significant minister to a part of the chapel family that the other chaplains

did not seem to reach," and that "he had a very positive effect on them and his presence and concern was very important to them." AR 27. Walker states that Robertson acted professionally and with dignity and "never said a negative word about Chaplain Elwell" to her or in her presence. Walker also writes that Elwell told her that he had to get Robertson out of the service before Robertson was eligible for retirement. AR 27.

In addition, the Air Force submitted the following advisory opinions to the AFBCMR:

(1) CMSgt. Clarence Lee Jr., Chief Evaluation Procedures Section, Evaluation Programs Branch, Randolph AFB, Texas, reviewed the contested OPRs, advised that the OPRs were processed in accordance with AFR 36-10, and recommended disapproval of Robertson's request to remove them. AR 41.

(2) Major Marianne Sterling ("Sterling"), Chief, Appeals and Special Selection Board Branch, Directorate of Personnel Program Management, also reviewed the contested OPRs and recommended that Robertson's appeal be denied. Sterling noted that Robertson had failed to provide any support from the evaluators of the reports and only provided the letter from Walker and five pages from a 203-page transcript of the BOI hearing, neither of which substantiated any error in the OPRs. Sterling commented that the contested OPRs involved three different raters, three different additional rates, and three different reviewers and thus, "[w]e are not convinced nine senior officers were 'out to get' the applicant." AR 42-43.

(3) Mary Dauphine ("Dauphine"), Program and procedures Branch, Directorate of Personnel Program Management, reviewed Robertson's "retirement process" and recommended denial of his request to rescind the Secretary of the Air Force's Order for Robertson's involuntary release from active duty as there was "no evidence of error, injustice, or impropriety." Dauphine explained that Robertson submitted a request to retire on June 1, 1993, effective June 1, 1994, prior to the initiation of the AFR 36-2 action and as a result of the action, the Secretary of the Air Force authorized Robertson's retirement pursuant to 10 U.S.C. §1186.

On November 15, 1994, Robertson filed a claim with the Air Force under the Federal Tort Claims Act ("FTCA") seeking damages for the Air Force's fraudulent representation that Robertson had a personality disorder, that he was insubordinate and his work was substandard, which resulted in his premature separation from the service. Plaintiff's Exhibit to Complaint in 95-C-1135-B. The Air Force denied the claim on July 13, 1995. Id. Robertson then filed his first complaint against the United States before this Court in Case No. 95-C-1135-B on November 14, 1995 asserting claims under the FTCA and the Administrative Procedure Act ("APA"). On March 25, 1996, the Court granted the government's motion to dismiss, finding lack of subject matter jurisdiction over Robertson's FTCA claim based on the Feres doctrine, and failure to state a claim under the APA based on the doctrine of nonjusticiability, citing Lindenau v. Alexander, 663 F.2d 68 (10th Cir. 1981).

On August 23, 1995, the AFBCMR handed down its decision denying Robertson's application for correction of medical records. AR 57. The AFBCMR found that Robertson had failed to show that the contested OPRs or the retirement process were unjust or in error:

> Insufficient relevant evidence has been presented to demonstrate the existence of probable error or injustice. We have thoroughly reviewed the applicant's contentions and his submission in judging the merits of the case. However, we do not find the documentation sufficiently persuasive so as to override the rationale expressed by the Offices of the Air Staff. The applicant believes that the contested OPRs were written as a reprisal for a letter written to the editor of a local newspaper. His commander, who administered the January 1991 Letter of Reprimand, stated he had no objection to the applicant expressing his political opinions in letters to congressmen or in a letter to the editor; however, when the applicant used his military title and unit of assignment, he violated AFR 110-2 which prohibits Air Force members on active duty from engaging in political activities. The applicant has not shown that the commander's action was inappropriate. We note the statement from the Protestant Chapel employee; however, this statement does not substantiate that the contested OPRs were erroneous. Applicant does not submit supporting documentation from any of the rating chain members who were different individuals on all

four OPRs in questions over a four-year period. We also note that the applicant submitted a request to retire in June 1993 but the request was not acted on because of a pending AFR 36-2 action. His retirement was subsequently approved by the Secretary of the Air Force and we find no evidence of error regarding the retirement process. Therefore, we agree with the recommendation of the Air Staff and do not believe the applicant has been the victim of an error or injustice. In the absence of evidence to the contrary, we find no compelling basis to recommend granting the relief sought in this application.

AR 60.

On September 27, 1996, Robertson filed the instant suit alleging that the actions taken by the Air Force which led to Robertson's dismissal from active duty were unconstitutional and violated AFR 265-1. Robertson seeks reinstatement in the military chaplaincy with "the commission to conduct a comprehensive study under the supervision of Air University, Maxwell AFB, Alabama, for the purpose of identifying and interpreting the dynamics involved in serving as both a religious minister and a military officer on active duty." Plaintiff's Supplemental Brief in 96-C-888-B, p. 6.

## B. ANALYSIS

1. The Administrative Procedures Act

It is helpful to begin with what the claim in this case is not: it is not a constitutional attack on the validity of any Air Force regulation, specifically

AFR 110-2, and it is not a claim for contract damages under the Tucker Act, 28 U.S.C. §1346. The claim in this case is one of review under the Administrative Procedures Act (APA), 5 U.S.C.A. § 701 et seq., which states in pertinent part:

> [a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States...

5 U.S.C. § 702. Specifically Robertson seeks judicial review of the AFBCMR's denial of his application to remove the unfavorable OPRs and to rescind the Secretary's order for his retirement from active duty, which Robertson alleges resulted from the Air Force's violation of the First Amendment and AFR 265-1. Robertson also alleges that the Air Force did not comply with prescribed procedures in his retirement process. The relief Robetson seeks is equitable - removal of the unfavorable OPRs from his military record and reinstatement. [n.3 Although Robertson seeks back pay and other benefits incident to his reinstatement, the Court does not find that the "prime objective" or "essential purpose" of his claim is to recover money - which would

vest exclusive jurisdiction with the Court of Federal Claims under The Tucker Act, 28 U.S.C. §§1346, 1491. Burkins v. United States, 112 F.3d 444, 449 (10th Cir. 1997). Rather, Robertson's "primary objective [is] to have the court declare the nature of the prospective relationahip between [himself] and the [Air Force]." Id. at 450. As the claim is not one pursuant to The Tucker Act, the Court determines that it has subject matter jurisdiction.] The court thus has jurisdicton under the APA.

As this case is before the Court for judicial review of a final agency action, the procedural vehicle of summary judgment is inappropriate. It is not the Court's role to determine whether there are factual questions which require trial, but rather whether the AFBCMR's final decision should be affirmed or set aside. 5 U.S.C. §706. Accordingly, the Court views the cross motions for summary judgment as appellate briefs in support of and in opposition to the appeal of the AFBCMR's decision, and by agreement of the parties, considers the entire record presented in this case and in Case No. 95-C-1135-B in its review. [n.4 Along that line and in response to the government's res judicata defense, the Court finds that its Order dismissing Robertson's APA claim in Case No. 95-C-1135-B does not preclude his APA claim in this case. In that Order, the Court dismissed Robertson's APA claim with prejudice for failure to state a claim, concluding under Lindenau v. Alexander, 663 F.2d 68 (10th Cir. 1981), that Robertson's APA claim was not justiciable. However, Lindenau expressly requires that intra-service remedies be

exhausted and at the time of the Court's Order, the AFBCMR had not rendered its decision on Robertson's application. The Court concludes, therefore, that the dismissal of Robertson's APA claim should have been without prejudice to refiling when a final agency decision was reached. Thus, the doctrine of claim preclusion does not bar Robertson's APA claim in this case.] Olenhouse v. Commodity Credit Corp. 42 F.3d 1560, 1565 (10th Cir. 1994)("When acting as a court of appeal, it is improper for the district court to use methods and procedures designed for trial").

2. Justiciability (The Mindes Test)

Although the Court applied the Mindes test in dismissing Robertson's first APA complaint in Case No. 95-C-1135-B, the Court finds the analysis troubling and chooses not to rely upon it in the Court's review of Robertson's APA claim in this case.

In Lindenau v. Alexander, 663 F.2d 68 (10th Cir. 1981), the Tenth Circuit adopted a test proposed by the Fifth Circuit in Mindes v. Seaman, 453 F.2d 197 (5th Cir. 1971). The test is two-pronged. The first prong prohibits judicial review unless the plaintiff has exhausted "available intra service corrective measures" and alleges either a deprivation of constitutional right or a violation by the military of a statute or military regulation. Mindes, 453 F.2d at 201. If the first prong is met, then the court must balance the following factors: (1) "the nature and strength of the plaintiff's challenge to the military determination"; (2) the "potential injury to the plaintiff if review is refused";

(3) the "type and degree of anticipated interference with the military function"; and (4) the "extent to which the exercise of military expertise or discretion is involved." Id. at 201-02. Only if the factors balance in favor of plaintiff does the court determine the merits of the claim.

The test is thus one of reviewability or justiciability. However, unlike traditional justiciability doctrine by which the court determines if the claim is justiciable based on political question, and if found to be justiciable, then proceeds to the merits, the Mindes test actually balances the merits of the case to determine if the case is justiciable. The purpose of injecting this test into the review process was characterized by the Mindes court as a "judicial policy akin to comity," that rcognized a judicial "unwillingness to secondguess judgments requiring military expertise and ... a reluctance to substitute court orders for discretionary military decisions." Mindes, 453 F.2d at 199. In other words, the test mixes the deferential standard of review applied to the military disputes with the concept of justiciability. Dillard v. Brown, 652 F.2d 316, 323 (3d Cir. 1981)("The difficulty which we perceive with the Mindes analysis is that it intertwines the concept of justiciability with the standards to be applied to the merits of the case."); Knutson v. Wisconsin Air National Guard, 995 F.2d 765, 768 (7th Cir. 1993); Kreis v. Secretary of the Air Force, 86 F.2d 1508, 1512 (D.C. Cir. 1989).

In applying the Mindes test to this case, the Court noted several problems.

First, the test requires the exhaustion of administrative remedies. It was this requirement which mandated the Court's reassessment of the dismissal of the prior action as a dismissal without prejudice rather than with prejudice, as the AFBCMR had not yet ruled on Robertson's intra-service appeal. However, since Mindes and Lindenau, the Supreme Court in Darby v. Cisneros, 509 U.S. 137 (1993), has held that federal courts do not have authority to require plaintiffs to exhaust administrative remedies before seeking review under the APA where neither statute nor agency rule specifically requires exhaustion as a prerequisite to judicial review. Lower courts have since applied Darby to military appeals under the APA and concluded that there is no statute or regulation requiring exhaustion of intra-service remedies. Dowds v. Clinton, 18 F.3d 953 (D.C. Cir. 1994) and Perez v. United States, 850 F.Supp. 1354 (N.D.Ill. 1994). [n.5 The Perez court rejected the government's attempt to distinguish Darby on grounds that the Supreme Court "was not confronted with prior precedent recognizing the military's special status as an agency apart with its own 'comprehensive internal system of justice to regulate military life.'" Perez, 850 F.Supp. at 1360.

> While cognizant of the special nature of the armed services and the potential dangers of unwarranted judicial interference with military activity, this court declines the government's invitation to carve out a special military exception to the Supreme Court's decision in Darby. In this

> regard, it is important to remember that Darby does not preclude agencies or Congress from making administrative exhaustion a prerequisite to federal jurisdiction. Rather, it simply demands that such prerequisites be made explicit by Congress (through statutes) or agencies (through rules), rather than by judges. Until such action is taken, military personnel like Perez will be entitled to seek direct judicial review of final military decisions, such as the discharge at issue here, without first exhausting all available administrative remedies. Id. at 1360-61.]

The court knows of no statute or regulation requiring exhaustion in this case and does not interpret 10 U.S.C. §1552 which establishes military boards of review as "specifically mandat[ing] exhaustion as a prerequisite to judicial rview." The Court thus questions the viability of the Mindes test in light of Darby.

Even if the Court were to overlook the exhaustion requirement in the Mindes test, the Court is bothered by its confusing mix of political question doctrine and deferential standard of review. Application of the Mindes test can result in a court's refusal to conduct any review although the case would not be precluded from review under traditional political question doctrine. Further, the Court finds no basis in Supreme Court precedent for excepting the military from all judicial review under the APA. [n.6 To the contrary, in Chappell v. Wallace, 462 U.S. 296, 303 (1983), the Supreme Court specifically noted that decisions by military boards

of correction pursuant to 10 U.S.C. §1552 "are subject to judicial review and can be set aside if they are arbitrary, capricious or not based on substantial evidence."] This is particularly true for claims of constitutional violation, which are expressly included in the APA's scope of review. See 5 U.S.C. §706(2)(B). What the Court does find in Supreme Court precedent involving constitutional challenges of military actions is the application of a standard of review which is decidedly deferential. However, no matter how deferential, there is judicial review.

For these reasons, the Court declines application of the Mindes test and addresses the merits in light of the applicable standard of review set forth below.

3. Standard of Review

Having determined that the Air Force's actions are subject to review, the Court determines the apporpriate standard of review. Judicial review of formal agency action under the APA is governed by 5 U.S.C. §706 which states six separate grounds for reversal:

> To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall -
>
> * * * *
>
> (2) hold unlawful and set aside agency action, findings, and conclusions found to be -
>
> (A) arbitrary, capricious, an abuse of

> discretion, or otherwise not in accordance with law;
> (B) contrary to constitutional right, power, privilege, or immunity;
> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
> (D) without observance of procedure requird by law;
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations, the court shall review the whole record or those parts or it cited by a party, and due account shall be taken of the rule of prejudicial error.

See also Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 413 n.30 (1971); Olenhouse, 42 F.3d at 1573-76.

As noted above, Robertson requests this Court to set aside the decision of the AFBCMR on two bases: (1) the actions of the Air Force were "contrary to [his] constitutional right[s]" under the First Amendment (and as recognized by AFR 265-1); and (2) the Air force did not comply with prescribed procedures in his retirement process. The first basis requires the application of the deferential standard of review set forth below. The second mandates reversal if the decision of the AFBCMR was "arbitrary, capricious, in bad faith, unsupported by substantial evidence or contrary to law, regulation or published

procedure." Wyatt v. United States, 23 Cl.Ct. 314, 318-19 (1991); Chappell, 462 U.S. at 303; Dodson v. United States, 988 F.2d 1199, 1204-05 (Fed. Cir. 1993); Kreis v. Secretary of the Air Force, 866 F.2d 1508, 1514-15 (D.C. Cir. 1989); Olenhouse, 42 F.3d at 1573-76 (general discussions of the scope of review of agency action).

a. Deference to Military in Constitutional Challenges of Military Actions

The Supreme Court has long recognized the need for deference when facing constitutional challenges to military decisions. Because the Constitution expressly assigns the responsibility of military affairs to the Legislative and Executive branches, the Supreme Court has consistently shown great restraint in second-guessing their supervision. "[J]udicial deference to [a] congressional exercise of authority is at its apogee when legislative action under the congressional authority to raise and support armies and make rules and regulations for their governance is challenged." Rostker v. Goldberg, 453 U.S. 57, 70 (1981). On a more practical level, the Judicial branch acknowledges its lack of expertise in military matters:

> it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.

Gillign v. Morgan, 413 U.S. 1, 10 (1973); Orloff v. Willoughby, 345 U.S. 83, 93 (1953) ("judges are not given the task of running the Army. . . . Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army must be scrupulous not to intervene in judicial matters"). Further restraining judicial review is an appreciation of the necessity of conformity, discipline and obedience to an effective national defense. Chappell v. Wallace, 462 U.S. 296, 300 (1983)("The inescapable demands of military discipline and obedience to orders cannot be taught on battlefields; the habit of immediate compliance with military procedures and orders must be virtually reflex with no time for debate or reflection"). The deference shown the legislative and executive branches over military affairs is thus mirrored by that shown to the decision-making authority of military personnel who "have been charged by the Executive and Legislative Branches with carrying out our Nation's military policy." Goldman v. Weinberger, 475 U.S. 503, 508 (1986).

Accordingly, the Supreme Court has adapted its review of the individual constitutional rights of service members to reflect the "communal" exigencies of military life. While members of this "specialized" community retain their individual constitutional rights, those rights are mere shadows of their civilian counterparts. For example, the Supreme Court has upheld military regulations which denied - a Jewish clinical psychologist at an Air Force base mental

health clinic his free exercise right to wear a yarmulke, Goldman, 475 U.S. at 509-10 ("[t]he First Amendment does not require the military to accommodate such practices in the face of its view that they would detract from the uniformity sought by the dress regulations"); service members their free speech right to circulate petitions on bases without prior military approval, Brown v. Glines, 444 U.S. 348, 358 n.14 (1980)("Loyalty, morale, and discipline are essential attributes of all military service. Combat service obviously requires them"); and service members their First Amendment right to the distribution of political materials on base, Greer v. Spock, 424 U.S. 828, 837 (1976)(recognizing "the special constitutional function of the military in our national life").

Given that the Supreme Court did review the above constitutional challenges to the military, it is clear that "deference does not mean abdiction," Rostker, 453 U.S. at 70, and further persuades the Court that it is required to review Robertson's constitutional challenge under the APA. This review, however, is conducted with the traditional deference applied to military disputes.

4. Constitutional Challenge under the Religion Clauses

Robertson asks the Court to hold unlawful and set aside Air Force actions which he asserts were taken in violation of his constitutional rights under the First Amendment and in excess of the Air Force's authority under AFR 265-1. [n.7 AFR 265A(1), entitled Chaplain Service Mission states the following:

> The mission of the Air Force Chaplain Service is to provide opportunities for the free exercise of religion in the Air Force community through worship, rites, religious education, visitation, pastoral counseling, and a responsiveness to individual religious needs.]

It is Robertson's contention that the reason for his unfavorable OPRs and premature retirement from the Air Force originated in his "moral judgment" that American troops should not engage in a military action against Iraq, which was published in a letter to the editor of a local newspaper in Abilene, Texas on January 5, 1991, when American troops had been mobilized to Saudi Arabia in Operation Desert Shield. Robertson argues that the First Amendment and AFR 265-1 not only grant him the right but mandates his duty to determine whether the Iraqi conflict was a "just war" so that he may assist soldiers in clarifying and evaluating the moral issue for themselves. His letter, he explains, was one written by a military pastor, borne of moral, not political concerns. And thus, he was freely exercising his religious rights in expressing those moral concerns. The Air Force's response, according to Robertson, was to punish and ostracize him, remove him from his preaching duties, intimidate and harass him by ordering him to undergo three mental examinations which incorrctly diagnosed him as having a personality disorder, and finally bringing an AFR 36-2 separation proceeding against him which resulted in his forced retirement from service. In so doing, the Air Force acted outside the

scope of their authority and violated AFR 265-1 and the Establishment and Free Exercise Clauses of the First Amendment.

The record reflects that the Air Force considered Robertson's letter to the editor to be a violation of AFR 110-2, which restricts the political activities of members of the Air Force. Specifically, AFR 110-2 allows a member of the Air Force to "express his or her personal opinion on political candidates and issues, but not as a representative of the Armed Forces." It is the Air Force's position that Robertson crossed the line of permitted behavior under AFR 110-2 when he identified his military title and unit of assignment in his subscription to a letter which commented on Operation Desert Shield, a political activity [n.8 Although the Air Force has a legitimate concern that its members not publicly oppose specific military action as representatives of the Air Force, the guidelines to AFR 110-2 do not make such proscription crystal clear. In Enclosure 2 to AFR 110-2, entitled "Political Activities: Supplemental Guidelines," the following is identified as an example of the type of political activity permitted: "Write a letter to the editor of a newspaper expressing the member's personal views concerning public issues, if those views do not attempt to promote a partisan political cause." A "partisan political activity" is defined in the regulation as an "activity supporting or relating to candidates representing, or issues specifically identified with, national or State political parties and associated or ancillary organizations." The use of force to drive Iraq from Kuwait, although a political issue, was

not a partisan political issue, particularly in January 1991 when both the Republican and Democratic Parties were divided on the issue.], and flouted military authority by questioning the President's use of force in Kuwait.

> We do not disagree that [Robertson] has an absolute right to express his own personal views; his error, however, occurred when he indicated his base and official title and targeted a statement by the Vice President. In so doing, he removed himself from the realm of a concerned citizen and represented himself as an Air Force officer expressing a partisan viewpoint. While the applicant justifies his actions as pastoral in nature, as a military -- and the key word is "military" -- chaplain, he is, in fact, bound by the same rules of conduct as other individuals in the armed forces.

AFBCMR's April 19, 1993 Ruling, Government Exhibit O.

This initial conflict set the stage for the following events:

A few months after the letter, the Air Force issues an OPR critical of Robertson's leadership skills. Robertson responds by sharing with his congregation in a sermon on "personal commitment to the wisdom communicated by the divine spirit" that his career will be adjusted according to the evaluations of his senior commanders who have criticized that personal commitment. The sermon is followed by a Letter of Counseling from the Air Force, Robertson's removal from the preaching schedule, the refusal of other Air Force bases to accept Robertson as part of their staff and a

commander-directed psychological evaluation. In response, Robertson files a Charge of Institutional Discrimination. And the Air Force issues another unfavorable OPR, noting that Robertson's "attitude toward authority and the Air Force system has been one marked by indifference to rebellion; at times, just short of insubordination." Robertson responds by affirming that he is not one of the "[s]ervants of a democratic god," "the kind of ministers the AF promotes." A year and a half to two years after the letter to the editor, Brigadier General Allen issues a Letter of Reprimand to Robertson for disrespect and insubordination toward his commanding officer, Senior Chaplain Elwell; Elwell orders that Robertson undergo another psychiatric evaluation which results in a diagnosis of personality disorder, and another unfavorable OPR issues. Robertson objects that the leaders of the Chaplain Service are isolating him for refusing "to promote a nationalistic spirit." Brigadier General Allen threatens an AFR 36-2 separation action unless Robertson voluntarily retires by a certain date. Robertson refuses. Robertson requests voluntary retirement. An AFR 36-2 proceeding is convened; the BOI recommends that Robertson be removed from active duty; and the Secretary of the Air Force orders Robertson to retire. Robertson files an appeal to the AFBCMR, which is denied.

Robertson's appeal to this Court raises two underlying constitutional questions: (1) whether the Air Force violated Robertson's rights under the First Amendment by treating his published "moral judgment" that the Persian Gulf

war was not a "just" war as a political issue and reprimanding him accordingly; and (2) whether the Air Force's actions against Robertson as an Air Force chaplain violate the Establishment and Free Exercise Clauses by effectively promoting a "military religion" through its chaplaincy program.

The Court is guided in its analysis of the first question by the United States Supreme Court's decison in Gillette v. United States, 401 U.S. 437 (1971). In Gillette, petitioners were conscientious objectors to the war against Vietnam who challenged the constitutionality of §6(j) of the Military Selective Service Act of 197, 50 U.S.C. §456(j), as violative of the Free Exercise and Establishment clauses of the First Amendment. Section 6(j) provided that no person shall be subject to "service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form." Petitioners asserted that in limiting recognition of conscientious objectors to those who opposed war as such, and excluding those who opposed a particular war, Congress impermissibly discriminated among types of religious belief and affiliation, thereby rendering §6(j) fatally underinclusive:

> This happens, say petitioners, because some religious faiths themselves distinguish between personal participation in "just" and in "unjust" wars, commending the former and forbidding the latter, and therefore adherents of some religious faiths--and individuals whose personal beliefs of a

> religious nature include the distinction--cannot object to all wars consistently with what is regarded as the true imperative of conscience.

Id. at 452

As noted by Justice Douglas in his dissent in Gillette, one of the petitioners, Louis Negre ("Negre"), was a devout Catholic who opposed the war in Vietnam. According to Catholic doctrine, "a person has a moral duty to take part in wars declared by his government so long as they comply with the tests of his church for just wars. Conversely, a Catholic has a moral duty not to participate in unjust wars." Id. at 469 (Douglas, J. dissenting, citing Pope John XXIII in Part II of Pacem in Terris 46, 51 (Paulist Press 1963)). The determination of whether a particular war is a "just" war is a personal decision which a Catholic must make as a matter of conscience after studying the facts. Id. at 471. Negre made this determination, and yet because he did not oppose all wars, his application for discharge as a conscientious objector was denied purusant to §6(j). Id. at 474.

Rejecting petitioners' argument that §6(j) is a law respecting the establishment of religion by discriminating against conscientious objectors like Negre, the Supreme Court held that §6(j) did not violate the Establishment Clause because there were "valid neutral reasons" for limiting the exemption to objectors of all wars; e.g., the government's need for manpower and interest in maintaining a fair induction system. Id. at 454. In so holding, the Court recognized that including conscientious objectors to a particular

war "would involve a real danger of erratic or even discriminatory decisionmaking in administrative practice." Id. at 455. Such would result because "[a]ll the factors that might go into nonconscientious dissent from policy, also might appear as the concrete basis of an objection that has roots as well in conscience and religion." Id. Thus, "opposition to a particular war may more likely be political and nonconscientious, than otherwise." Id.

> Ours is a Nation of enormous heterogeneity in respect of political views, moral codes, and religious persuasions. It does not bespeak an establishing of religion for Congress to forgo the enterprise of distinguishing those whose dissent has some conscientious basis from those who simply dissent. Id. at 457.

The Court also held that §6(j) did not violate the Free Exercise Clause. Acknowledging "a general harmony of purpose" between the religion clauses, the Court noted that the Free Exercise Clause, however, has a reach of its own although the neutral governmental interests which defeated petitioners' Establishment Clause challenge are also "of a kind and weight sufficient" to meet the requirements of the Free Exercise Clause. Id. at 461. Recognizing that the Free Exercise Clause bars "governmental regulation of religious beliefs as such'" Sherbert v. Verner, 374 U.S. 398, 402 (1963), as well as interference with the dissemination of religious ideas, Fowler v. Rhode Island,

345 U.S. 67,73 (1953), the Court scrutinized the government's "neutral" interests to determine if the conscription laws violated the free exercise clause.

> The conscription laws, applied to such persons as to others, are not designed to interfere with any religious ritual or practice, and do not work a penalty against any theological position. The incidental burdens felt by persons in petitioners' position are strictly justified by substantial governmental interests that relate directly to the very impacts questioned. And more broadly, of course, there is the Government's interest in procuring the manpower necessary for military purposes, pursuant to the constitutional grant of power to Congress to raise and support armies. Art. I, s8.

Id. at 462.

Like Negre, Robertson sincerely believes that the war he opposed was "unjust" and he was compelled by conscientious, religious conviction to object. However, the sincerity and conviction of his moral judgment as an individual and military officer does not mandate accommodation by the Air Force. As Robertson himself has insisted, it is not the role of the Air Force to make moral judgments. Its role is to fight for and defend nationalistic interests. Rostker, 453 U.S. at 70 ("'it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise'"). When or if that role is moral is not, under the Constitution, for the Air Force to

decide. It may be, as quoted by Justice Douglas in his dissent in Gillette, that

> modern wars can never fulfill those conditions which . . . govern - theoretically - a just and lawful war. Moreover, no conceivable cause could ever be sufficient justification for the evils, the slaughter, the destruction, the moral and religious upheavals which war today entails. In practice, then, a declaration of war will never be justifiable.

Id. at 472-73 (quoting Cardinal Ottaviani in The Future of Offensive War, 30 Blackfriars, 415, 419 (1949)). But that determination is obviously not one for the Air Force, but one to be made by each individual, as well as a democratic nation made up of individuals of various ethnic, cultural and religious origin.

As an Air Force officer, Robertson was bound by the same rules of conduct as other members of the Air Force. These rules include AFR 110-2 which prohibits all members of the Air Force from expressing their personal opinions on political issues as representatives of the Air Force. The Air Force paradigmatically viewed Robertson's "moral" objection as political, its effect to undermine the authority, discipline and unity of the force at a time of conflict. Within this military "neutral" context, the Air Force issued unfavorable reviews of Robertson's "military" leadership skills and eventually forced his early retirement from the service. Given his public opposition to the Persian Gulf war and defiant insistance that his "political"

view be condoned, the Air Force concluded Robertson was no longer the kind of officer the Air Force desired to keep in its ranks. In so responding, the Air Force was enforcing interests the Supreme Court has deemed neutral, legitimate and of sufficient weight and significance to defeat challenge under the religion clauses. As noted in Goldman, 475 U.S. at 507,

> The military need not encourage debate or tolerate protest to the extent that such tolerance is required of the civilian state by the First Amendment; to accomplish its mission the military must foster instinctive obedience, unity, commitment, and esprit de corps.

Accordingly, the Court finds no constitutional violation pertaining to the Air Force's censure of Robertson's public criticism of the Persian Gulf War, given that the letter was written in his representative capacity as a member of the Air Force. [n.9 Although not raised by Robertson, the Court also concludes that the Air Force did not violate his right to free speech. The Supreme Court has upheld the constitutionality of military regulations requiring members of the Air Force to seek approval from the base commander before circulating petitions on Air Force bases, Brown v. Glines, 444 U.S. 348 (1980), and requiring civilians to seek permission from the base commander before distributing political material on Army bases, Greer v. Spock, 424 U.S. 828 (1976). Although the plaintiffs in these cases argued that the regulations were unconstitutional prior restraints on

speech, the Supreme Court held that the regulations protected a substantial government interest - a military commander's duty "to avert what he perceives to be a clear danger to the loyalty, discipline, or morale of troops on the base under his command." Spock, 424 U.S. at 840. In so holding, the Supreme Court noted that members of the military are not entitled to the same free speech protections granted civilians because their rights "must yield somewhat 'to meet certain overriding demands of discipline and duty.'" Glines, 444 U.S. at 354. Given the breadth of these decisions and the extreme deference shown the military, the Court does not see how reprimanding Robertson, who was speaking as a representative of the Air Force, for publicly objecting to military action in the Persian Gulf during a time of military readiness violates his right to free speech.]

Nor does the fact that Robertson was a chaplain at the time of the challenged actions alter this finding. Robertson is not the first and likely will not be the last to complain that the military chaplaincy program promotes a "military religion." See, e.g., United States v. Gray, 41 C.M.R. 756, 758 (1968)(marine violated Uniform Code of Military Justice when he issued antiwar statement to press during war in Vietnam stating among other things that "[i]n general, church services served well for war propaganda . . . I . . . have never met a chaplain agaist the war"); See also Smith v. United States, 502 F.2d 512 (5th Cir. 1974)(upholding discharge of VA hospital chaplain who insisted on wearing a peace pin while treating emotionally

disturbed veterans); Baz v. Walters, 782 F.2d 701, 709 (7th Cir. 1986)(rejecting VA hospital chaplain's charge that the VA promoted an "institutional theology" in its hospital chaplaincy program); Carter v. Broadlawns Medical Center, 857 F.2d 448 (8th Cir. 1988)(same). Inherent in the relationship between the military services and their chaplaincy programs is an institutional duality which pulls at opposing constitutional constraints.

A military chaplain is a member of two institutions: the military and a religious denomination. The government's involvement with military chaplaincy begins with dictating who may become a chaplain. Pursuant to 10 U.S.C. §532, the Department of Defense ("DOD") promulgates criteria for denominations who endorse chaplains and the applicants they endorse. See 32 C.F.R. §65.4(b). Religious faith groups that wish to become endorsing agencies must be approved by the DOD. 32 C.F.R. §65.5(b). Among the criteria for acceptance as an ecclesiastical endorsing agency is the agency's commitment to "[a]bide by the applicable DOD regulations and policies. 32 C.F.R. §65.5(b)(1)(v). The DOD also has the power to revoke its recognition of an endorsing agency that fails to abide by its applicable regulations and policies. 32 C.F.R. §65.5(b)(2). In addition to the requirements set forth by the DOD, chaplains must also meet the requirements for appointment as an officer and chaplain established by the particular military branch. 32 C.F.R. §65.5(d).

Once appointed, chaplains are uniformed, commissioned officers. 10 U.S.C. §8067(h)("Chaplain functions in

the Air Force shall be performed by commissioned officers of the Air Force who are qualified under regulations prescribed by the Secretary and who are designated as chaplains."). They have rank, without command. 10 U.S.C. §8581. As commissioned officers, military chaplains are subject to the chain of command and under the authority of their superiors. Chaplains are rated and promoted by the same evaluation procedures used for all other military officers. They are obligated to follow the orders of their commanding officers, are subject to the Uniform Code of Military Justice, 10 U.S.C. §802; statutes pertaining to the removal of officers for substandard performance, 10 U.S.C. §1181 et seq.; and all pertinent military rules and regulations.

This institutional duality of the military chaplaincy directly implicates the Establishment Clause principle of "nonentanglement" and "neutrality." Marsh v. Chambers, 463 U.S. 783, 801-03 (1983)(Brennan dissenting)(separation and neutrality required by Establishment Clause); Walz, 397 U.S. at 676 and 695 (tax exemption reflects government neutrality and avoids excessive entanglement with religion); Lemon v. Kurtzman, 403 U.S. 602, 612-613 (1971). The test for nonentanglement for programs, such as the military chaplaincy, which require an administrative relationship between governmental and religious entities, is that the programs must preserve "the autonomy and freedom of religious bodies while avoiding any semblance of established religion." Walz, 397 U.S. at 672. Similarly, the principle of

"[g]overnment neutrality in matters of religion" prevents government from advancing or inhibiting religion. Gillette, 401 U.S. at 449; Walz, 397 U.S. at 694' Larson v. Valente, 456 U.S. 228, 246-47 (1982). Without these safeguards, the institutional duality of the military chaplaincy engenders the risk of politicizing religion. Walz, 397 U.S. at 695; Larson, 456 U.S. at 253.

Serious questions of "excessive entanglement" and lack of "neutrality" are raised in the military administration of the chaplain programs. From the program's inception, governmental neutrality is questionable: the DOD's determination of criteria for the selection of endorsing agencies and their representatives may effect nonneutral religious endorsement and favor "military friendly" agencies for participation in the chaplaincy program. Being military officers, wearing military uniforms, participating in patriotic military ceremonies certainly "militarize" the chaplaincy. Similarly, the authority of commanding officers to review, evaluate, promote and recommend removal of chaplains provides encouragement and motive to espouse a religious ministry in line with military purpose. "Promotion of a chaplain within the military ranks is based solely on his military performance and not on his effectiveness as a cleric." Katcoff v. Marsh, 755 F.2d 223, 226 (2d Cir. 1985)(emphasis added). [n.10 Although the Katcoff court cites this as evidence of the military's "nonentanglement" with religion, such overlooks its likely influence on a chaplain's incentive to comply with military views.] The excessiveness of

such entanglement is no more apparent than in a situation such as the one Robertson presents where the Air Force requires a chaplain's early retirement (or discharges a chaplain) based on military criteria, although the chaplain's endorsing agency has not withdrawn its endorsement of the chaplain as its representative. This unilateral decision on the part of the Air Force hardly preserves "the autonomy and freedom" of the endorsing agency. Walz, 397 U.S. at 672.

One commentator obsrves that "[t]hroughout most of American history, the ideological relationship between organized religion and the military has been a harmonious one"; the traditional American belief inherited from the colonists was that "service to God equals service to country." [n.11 William T. Cavanaugh, Jr., Note, The United States Military Chaplaincy Program; Another Seam in the Fabric of Our Society, 59 Notre Dame L. Rev. 181, 195-199 (1983)] Consequently, the constitutionality of the military chaplaincy was rarely questioned. This perception, however, changed during the war in Vietnam.

> Scholars generally agree that the Vietnam experience sparked a general reappraisal of America's moral and religious traditions regarding the activities of the secular government. American society began to question whether America's participation in the war was justified, and serious doubt was expressed whether organized religion had any business legitimizing the unpopular and unjust war.

> Chaplains, sometimes referred to as "greased cogs in a machine for killing" because of their role in the military, came under particularly harsh criticism. The chaplain's role as a military officer was considered by many churchmen to be incompatible with the clergy role, necessitating elimination of the chaplaincy.
> The voices of criticism have quieted in rcent years, but the experience raises serious doubts whether the churches can ever again ally themselves so comfortably with the ideology of the military. The chaplain's resulting predicament is vividly described in a recent study of the chaplaincy: "The day will come, I feel, when the contrast . . . between the American military ethic and the American civilian ethic will be nowhere greater than in the field of religion. And the chaplain will be left, straddling the gap that has become a chasm!" [n.12 Id. (citations omitted)(quoting C. ABERCROMBIE, THE MILITARY CHAPLAIN 137 (1977). For other articles discussing the constitutionality of the military chaplaincy, see Julie B. Kaplan, Military Mirrors on the Wall: Nonestablishment and the Military Chaplaincy, 95 Yale L.J. 1210 (May 1986); Michael F. Noone, Rendering unto Caesar: Legal Responses to Religious Noncomformity in the Armed Forces, 18 St. Mary's L.J. 1233 (1987); Kenneth Lasson, Religious Liberty in the Military: The First Amendment under "Friendly Fire", 9 J.L. & Religion 471 (1992)]

Wars, particularly unpopular wars, widen

that gap. Robertson was not alone in his objection to the Persian Gulf War. Neither was he alone in the conflict between his role as a chaplain and military officer during that war. As noted by a scholar who researched the religious practices of the armed forces during the Persian Gulf war,

> [f]rom the earliest months of American military deployment in the Persian Gulf, various regulations, directives, orders and advisories sought to limit religious practices and expressions. Military chaplains, for example, were ordered to remove insignia showing their religion, and told to call themselves "morale officers." Also, chaplains were prohibited from being interviewed by the media, which in turn was forbidden to film any religious worship services. This was even on bases far away from Saudi citizens or military personnel, and caused a major negative response among the hundreds of chaplains deployed in the Gulf.

Kenneth Lasson, Religious Liberty in the Military: The First Amendment under "Friendly Fire", 9 J.L. & Religion 471 (1992). [n.13 Lasson later notes that these proscriptions were generally ignored:

> [d]espite the regulations promulgated from above - from the State Department, the Secretary of Defense, and others in positions of influence - military personnel from all the services freely engaged in religious practices. Directives were widely disregarded. Chaplains refused to call themselves "morale officers." Services were held for all denominations, on all

holidays. Kosher food, while difficult to obtain on military bases . . . was available in Riyadh - as was a Torah scroll flown in on a military transport from Frankfurt, West Germany.]

Ironically, it is the right of a "lonely soldier stationed at some faraway outpost" to the free exercise of his/her religion which has been traditionally cited as the primary justification for a military chaplaincy. Abington School Dist. v. Schempp, 374 U.S. 203, 309 (1963)(Stewart, J., dissenting)("Spending federal funds to employ chaplains for the armed forces might be said to violate the Establishment Clause. Yet a lonely soldier stationed at some far-away outpost could surely complain that a government which did not provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion."); id. at 297-98 (Brennan J. concurring)("Since government has deprived such persons of the opportunity to practice their faith at places of their choice . . . government may, in order to avoid infringing the free exercise guarantees, provide substitutes where it requires such persons to be."). Indeed, the military chaplaincy has often been cited as the model of permissible government accommodation of religion. Lynch v. Donnelly, 465 U.S. 68, 676 (1984)(public funding of military chaplains cited in support of public funding for creche); Marsh, 463 U.S. at 812 (Brennan, J., dissenting)(restating support for military chaplaincy, but denying support for legislative chaplaincy); Engel v. Vitale, 370

U.S. 421, 449 n.4 (1962)(Stewart, J. dissenting)(public funding of military chaplaincy to support prayer in public school); Abington, 374 U.S. at 309 (Stewart, J., dissenting)(same). Thus, although in dicta, several justices of the Supreme Court have recognized that the "presumed" violation of the Establishment Clause created by a military chaplaincy is justified as a necessary accommodation of the rights of military personnel to the free exercise of religion. Whether this model of "accommodation" will continue to stand the test of time and war remains to be seen.

The accommodation of the free exercise rights of members of the military was the primary justification given by the Second Circuit in Katcoff v. Marsh, 755 F.2d 223,234-35 (2d Cir. 1985) for upholding the constitutionality of the military chaplaincy. In determining whether the military chaplaincy programs violated the Establishment Clause, the Katcoff court first looked to the tripartite test set forth in Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1991): (1) whether the chaplaincy had a secular legislative purpose ("secular purpose"); (2) whether its principal effect was one that neither advances not inhibits religion ("neutrality"); and (3) whether it did not foster excessive government entanglement with religion ("nonentanglement"). Although acknowledging that the military chaplaincy would fail the Lemon test if viewed in isolation, the circuit court nonetheless concluded that it passed constitutional muster when viewed in light of its historical background, the

War Power Clause and judicial deference to the military's exercise of its discretion, and the Free Exercise Clause. Id. at 232-235.

In so holding, the court rejected an "absolutist" application of the Lemon test, finding that no single test provides the flexibility necessary for Establishment Clause inquiries: [n.14 Support for the Lemon test has suffered significant erosion over time. For example, in a recent decision striking a New York statute which created a special school district for the Satmer Hasidim as violative of the Establishment Clause, several justices complained that the Lemon test lacks necessary flexibility and should be dramatically changed or discarded. Board of Education of Kiryas Joel Village School District v. Grumet, 512 U.S. 687, 750-51 (1994)(Scalia, J. with Rehnquist, J. and Thomas, J. dissenting)(arguing to replace Lemon with a test embodying as its foremost principle "fidelity to the longstanding traditions of our people); id. at 720-21 (O'Conner concurring)(calls for abandoning Lemon test as too rigid and unitary). Although the Lemon test is still applied by lower courts, like the analysis in Katcoff, it is often "softened" by the circumstances presenting the Establishment Clause challenge.]

> "The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. . . . Short of those

> expressly proscribed governmental acts there is room for play in the joints productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference."

Id. at 233-34 (qouting Walz, 397 U.S. at 669). This is particularly so given that the "'different character of the military community and of the military mission'" impacts the protections granted by the First Amendment. Id. at 234 (quoting Parker v. Levy, 417 U.S. 733, 758 (1974).

> The line where military control requires that enjoyment of civilian rights be regulated or restricted may sometimes be difficult to define. But caution dictates that when a matter provided for by Congress in the exercise of its war power and implemented by the Army appears reasonably relevant and necessary to furtherance of our national defense it should be treated as presumptively valid and any doubt as to its constitutionality should be resolved as a matter of judicial comity in favor of deference to the military's exercise of its discretion.

Id. (citing Rostker, 453 U.S. at 64-68 (1981). Further, the Establishment Clause must be interpreted so as to accommodate the free exercise of religion when possible. In the case of the military chaplaincy program, both clauses obligate Congress "to make religion available to soldiers who have been moved by the Army to areas of the world where religion of their own denominations is not available to them." Id. at 234. Based on this analysis, the Second

Circuit concluded that "the chaplaincy program is relevant to and reasonably necessary for the Army's conduct of our national defense," and thus does not violate the Establishment Clause. Id. at 235.

The Court recognizes the seriousness and complexity of the issues raised by Robertson and appreciates the sincerity and conviction of his beliefs. However, the Court is persuaded by the reasoning set forth in Katcoff which soundly relies upon an established history of judicial recognition of the constitutionality of the military chaplaincy, and judicial deference to Congress and the Executive branch over military affairs. Notably, Robertson himself does not urge that the chaplaincy is unconstitutional; rather he seeks reinstatement in the Air Force chaplaincy and a commission to study "the dynamics involved in serving as both a religious minister and a military officer on active duty." While the Court may commend Robertson's individual pursuit of this study, the Court knows of no authority under the APA (or any other statutory or common law) to order the Air Force to grant such a commission. To the contrary, to do so would constitute unwarranted judicial intervention in military affairs. [n.15 Although jucdicial deference to the military generally determines the merits of claims involving intra-service military disputes before the court for review, courts have held that such deference sometimes determines whether the claim is "justiciable" based on the relief sought. Watson v. Arkansas National Guard, 886 F.2d 1004 (8th Cir. 1989)(injunctive relief of

reinstatement in Arkansas National Guard nonjusticiable); Kreis v. Secretary of the Air Force, 866 F.2d 1508, 1511 (D.C. Cir. 1989)(request for "retroactive promotion falls squarely within the realm of nonjusticiable military personnel decisions"). These courts distinguish these nonjusticiable remedies with "more modest request[s]" for corrective action found in the "normal review" of agency actions. Kreis, 866 F.2d at 1512. Clearly, under this analysis, Robertson's request that the Court order his reinstatement with a commission to study the problems of a military chaplaincy would so invade military personnel decision making as to render his claim for relief nonjusticiable.] Orloff, 345 U.S. at 93-94. As to Robertson's request under the APA to set aside the decision of the AFBCMR denying reinstatement and expungement of the subject OPRs, the Court concludes that the conflict between the Air Force and Robertson as an Air Force chaplain does not establish a constitutional violation of the religion clauses.

5. Administrative Review of Retirement Process

The AFBCMR's finding of no error in Robertson's retirement process can be set aside only if it is arbitrary, capricious, or not based on substantial evidence. Chappell, 462 U.S. at 303. "The function of this court is not to reweigh the evidence presented to the [AFBCMR]. Rather, the court is charged with determining 'whether the conclusion being reviewed is supported by substantial evidence.'" Robbins v. United States, 29 Fed.Cl. 717, 725 (1993).

Robertson's objection to the retirtement process is contradictory. He first argues that his request to retire lapsed when no action was taken by his commander within seven days. [n.16 Robertson claims that this seven-day approval period is stated on the retirement form. However, it does not appear in the retirement form, AF Form 1160, in the record. Ex. to Government's Reply in Case No. 96-C-888-B.] He then argues that the Air Force caused him and his family unnecessary and unreasonable hardship by not acting on his request to retire until the AFR 36-2 proceedings were concluded. Robertson requested retirement on June 1, 1993. Robertson was notified of the AFR 36-2 action against him on June 15, 1993. If he were correct that the request lapsed due to inaction on June 8, 1993, seven days later, there was no request for the Air Force to act on after that date.

The government contends that Robertson's request to retire did not lapse because it was not acted upon within seven days, but rather it was suspended during the AFR 36-2 proceeding. The only seven-day time period in AFR 35-7, Service Retirement, is one that is inapplicable to Robertson's situation as it refers only to the time a retirement eligible service member, upon being ordered to a new assignment, may opt to retire rather than take the new assignment. It is undisputed that Robertson never withdrew his request to retire. Thus, the request was still active when the Secretary elected to approve it pursuant to 10 U.S.C. §1186, as a result of the AFR 36-2 action.

The AFBCMR reviewed Robertson's objection to the retirement process and concluded the following:

> We also note that the applicant submitted a request to retire in June 1993 but the request was not acted on because of a pending AFR 36-2 action. His retirement was subsequently approved by the Secretary of the Air Force and we find no evidence of error regarding the retirement process.

AR 60. Based on the record before it, the Court cannot conclude that this finding is arbitrary, capricious or not based on substantial evidence.

C. CONCLUSION

Having found no underlying constitutional violation of Robertson's rights under the First Amendment, and thus AFR 265-1, and no error in the AFBCMR's finding regarding Robertson's retirement process, the Court affirms the decision of the AFBCMR.

IT IS SO ORDERED, this 28th Day of August, 1997.

THOMAS R. BRETT
UNITED STATES DISTRICT JUDGE

## APPENDIX C -- RULING OF THE AIR FORCE BOARD FOR CORRECTION OF MILITARY RECORDS

August 23, 1996

AFBCMR
1535 Command Dr, EE Wing, 3rd Flr
Andrews AFB, MD 20762-7002

Lt Col Garland L. Robertson
1336 E. 19th St.
Tulsa, OK 74120

Dear Colonel Robertson

Reference your application submitted under the provisions of AFI 36-2603 (Section 1552, 10 USC), AFBCMR Docket Number 94-04941.

After careful consideration of your application and military records, the Board determined that the evidence you presented did not demonstrate the existence of probable material error or injustice. Accordingly, the Board denied your application.

You have the right to submit newly discovered relevant evidence for consideration by the Board. In the absence of such additional evidence, a further review of your application is not possible.

BY DIRECTION OF THE CHAIRMAN:

FREDERIK WELLER
Chief Examiner
Air Force Board for Correction of Military Records

Attachment
Record of Board Proceedings [not included in this appendix]